Nos. 12-9526; 12-9527

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

and

SIERRA CLUB,

Intervenor-Respondent.

ON PETITION FOR REVIEW OF A CLEAN AIR ACT FINAL RULE ISSUED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF RESPONDENT

August 14, 2012

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ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

Public Service Company of Oklahoma v. EPA, No. 12-9525, filed in this Court on February 24, 2012, involves a petition for review of the same Final Rule, 76 Fed. Reg. 81,728 (Dec. 28, 2011).

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*
BART	Best Available Retrofit Technology
CAA	Clean Air Act, 42 U.S.C. §§ 7410-7671q. Also referred to as "Act."
EPA	Environmental Protection Agency
FIP	Federal Implementation Plan
Guidelines	BART Guidelines, 40 C.F.R. Part 51, Appendix Y. For the Court's convenience, EPA has provided citations to the Federal Register, 70 Fed. Reg. 39,156-72.
Haze Rule	Regional Haze Rule, 40 C.F.R. §§ 51.300-51.309
Manual	EPA's Control Cost Manual
NAAQS	National Ambient Air Quality Standard. Also referred to as "standards."
ODEQ	Oklahoma Department of Environmental Quality
SO_2	Sulfur Dioxide
SIP	State Implementation Plan

JURISDICTIONAL STATEMENT

EPA concurs with Petitioners' Jurisdictional Statement.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the United States Environmental Protection Agency ("EPA") acted within its statutory authority when it reviewed the substance of Oklahoma's Best Available Retrofit Technology ("BART") determination within the context of reviewing Oklahoma's regional haze state implementation plan ("SIP") revision for compliance with the Clean Air Act ("CAA") and EPA's regulations.
2. Whether the procedure by which EPA partially disapproved Oklahoma's regional haze SIP revision and promulgated a partial federal implementation plan ("FIP") to address the SIP's deficiencies in one Final Rule was consistent with the CAA.
3. Whether EPA acted within its statutory authority to promulgate the FIP after EPA's CAA deadline to do so had passed.
4. Whether the Final Rule is reasonable because the technical determinations that formed the basis of EPA's Final Rule are supported by the administrative record.
5. Whether Petitioners had adequate opportunity to comment on key provisions of the Final Rule.

STATEMENT OF THE CASE

The petitions for review challenge a final action taken by EPA to assure that emissions of sulfur dioxide ("SO_2") from certain power plants in Oklahoma comply with CAA requirements designed to combat serious regional haze and interstate air pollution problems. *See* "Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations," 76 Fed. Reg. 81,728 (Dec. 28, 2011)(the "Final Rule"). More specifically, the petitions challenge EPA's partial disapproval of Oklahoma's SIP submitted under the "regional haze" and "interstate transport" provisions of the CAA and issuance of a FIP establishing BART emissions limitations on SO_2 for Petitioner Oklahoma Gas and Electric Company's ("OG&E") Muskogee Units 4 and 5 and Sooner Units 1 and 2 ("Units"). *Id.* Because EPA's action is consistent with the Agency's authority under the CAA and well-supported by the administrative record, the petitions should be denied.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND.

A. Clean Air Act Overview.

The CAA controls air pollution through a system of shared federal and state responsibility. *See Mountain States Legal Found. v. Costle*, 630 F.2d 754, 757

(10th Cir. 1980). The Act requires EPA to establish, review, and revise national ambient air quality standards ("NAAQS") for certain common air pollutants. 42 U.S.C. §§ 7408-7409. The Act also requires EPA to promulgate regulations to prevent the impairment of visibility, or regional haze, in national parks and wilderness areas, called "Federal class I areas." *Id.* §§ 7491(b), 7492(e). Regional haze is produced by a number of sources and activities in a broad geographic area through emissions of fine particles (e.g., sulfates) and their precursors (e.g., SO_2,). *See* 76 Fed. Reg. 16,168, 16,170 (Mar. 22, 2011) (the "Proposed Rule").

The CAA requires each State to submit a SIP explaining how the State will implement, maintain, and enforce the NAAQS; ensure that in-state air pollutant emissions will not cause NAAQS problems or interfere with visibility protection in other states; and prevent impairment of visibility in national parks and wilderness areas. 42 U.S.C. §§ 7410(a)(1)-(2), 7492(e)(2). SIPs must be revised whenever EPA finds that a revision is necessary to achieve compliance with the Act or EPA's regulations. *See id.* §§ 7410(k)(5), 7492(e)(2). EPA is required to review each SIP to determine if it "meets all of the applicable requirements of [the Act]." *Id.* § 7410(k)(3). If EPA finds that a State has failed to submit a required SIP, or that a State's SIP is incomplete, or if EPA disapproves a SIP in whole or in part, the CAA requires that EPA promulgate a FIP to implement, maintain, and enforce the NAAQS and regional haze requirements in the State. *Id.* § 7410(c). The Act

requires that EPA do so within two years of such a finding or disapproval unless the State corrects the deficiency and EPA approves the revised SIP before EPA promulgates a FIP. *Id.*

B. The Clean Air Act Regional Haze Provisions.

Congress enacted CAA section 7491, entitled "Visibility protection for Federal class I areas," in 1977 "[i]n response to a growing awareness that visibility was rapidly deteriorating in many places . . . set aside for special protection in their natural states . . . ." *Chevron U.S.A., Inc. v. EPA*, 658 F.2d 271, 272 (5th Cir. 1981). *See* 42 U.S.C. § 7491. "Federal class I areas" include national wilderness areas and certain national memorial parks and national parks. *Id.* § 7472. In enacting section 7491, Congress declared as a national goal "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from man-made air pollution." *Id.* § 7491(a)(1). "Impairment of visibility" means "reduction in visual range and atmospheric discoloration." *Id.* § 7491(g)(6).

Congress required EPA to promulgate regulations to assure "reasonable progress" toward meeting the national goal and compliance with section 7491. *Id.* § 7491(a)(4). The regulations were to require SIPs for States in which a Class I area existed (and for States "the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility" in such Class I

area) to include emission limits, compliance schedules, and "other measures as may be necessary to make reasonable progress toward meeting the national goal." *Id.* § 7491(b)(2).

The regulations were also to require certain "major stationary sources" that "emit[] any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility" to "procure, install, and operate, as expeditiously as practicable (and maintain thereafter) [BART]." *Id.* § 7491(b)(2)(A); 40 C.F.R. § 51.301.[1] BART is "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility." 40 C.F.R. § 51.301. The emission limit is to be established on a case-by-case basis in consideration of five statutory factors ("the five statutory factors"): (a) the costs of compliance; (b) the energy and nonair quality environmental impacts of compliance; (c) any existing pollution controls in use at the source; (d) the remaining useful life of the source; and (e) the predicted visibility improvements from use of controls. 42 U.S.C. § 7491(g)(2).

Under the CAA, States have the initial responsibility of determining BART through SIPs. 42 U.S.C. § 7491(b)(2)(A) (major sources must install BART "as

[1] OG&E's Units qualify as "major stationary sources." *See* 42 U.S.C. § 7491(g)(7).

determined by the State"); *see also Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002) ("Congress intended the states to decide which sources impair visibility and what BART controls should apply to those sources."). However, if EPA determines that the State's determination does not meet the requirements of the Act, EPA must disapprove the SIP and ensure BART by promulgating a FIP for the State. *See* 42 U.S.C. §§ 7491(b)(2)(A) (major sources must install BART "as determined by the State (or the Administrator in the case of a [FIP] promulgated under section 7410(c)"); 7410(k)(3) (EPA must disapprove a SIP it if fails to meet the requirements of the Act); 7410(c) (EPA must promulgate a FIP if a State submits an incomplete SIP or EPA disapproves a SIP). The Act requires that "each source subject to BART" is required to install and operate BART as "expeditiously as practicable," but in no event later than five years after approval of the regional haze SIP. 42 U.S.C. § 7491(g)(4); 40 C.F.R. § 51.308(e)(1)(iv).

C. The Regional Haze Rule And The BART Guidelines.

Pursuant to Congress's direction, EPA promulgated the "Regional Haze Rule" in 1999 ("Haze Rule"). 64 Fed. Reg. 35,714 (July 1, 1999). EPA revised the Haze Rule in 2005 and at the same time issued the "BART Guidelines" to assist States in determining which sources are subject to BART and the appropriate emission limits for each applicable source. *See* 70 Fed. Reg. 39,104, 39,156-72 (July 6, 2005) (Guidelines codified at 40 C.F.R. Part 51, Appendix Y). The Haze

Rule is applicable to Oklahoma, 40 C.F.R. § 51.300(b), and requires "States to develop programs to assure reasonable progress toward meeting the national goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air pollution . . . ." *Id.* § 51.300(a).

Under the Haze Rule, each State must submit a SIP "containing emission limitations representing BART and schedules for compliance with BART for each BART-eligible source that may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area." *Id.* § 51.308(e). Under the CAA and the Haze Rule, BART emission limits for power plants such as OG&E's Units must be determined according to the BART Guidelines. 42 U.S.C. § 7491(b)(2)(last sentence); 40 C.F.R. § 51.308(e)(1)(ii)(B).

A BART determination involves three parts: (a) determining which sources meet the definition of "BART-eligible source," as set forth in 40 C.F.R. § 51.301; (b) determining if a source that falls within that definition "emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility" in a Class I area, making that source "subject to BART"; and (c) for each source subject to BART, identifying the appropriate type and level of control for reducing emissions. 70 Fed. Reg. at 39,106-07; *see also Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1335-36 (D.C. Cir. 2006) (describing the process in

two steps—the "Attribution Step" (parts (a) and (b)) and the "Determination Step" (part (c)). Only the Determination Step is at issue in this case.

The BART Guidelines establish a step-by-step process under the Determination Step or "case-by-case BART analysis." They are: (Step 1) identify all available retrofit control technologies; (Step 2) eliminate technically infeasible options; (Step 3) evaluate control effectiveness of remaining control technologies; (Step 4) evaluate impacts and document the results; and (Step 5) evaluate the visibility impacts. 70 Fed. Reg. at 39,164. The BART Guidelines also provide instructions on how each of these steps should be performed. 70 Fed. Reg. at 39,164-72.

D. The Clean Air Act Interstate Transport Provisions.

Not only must SIPs provide for controlling pollutant emissions within the State that might lead to violation of the NAAQS within the State itself, the CAA provides that a SIP must also assure that emissions within the State will not interfere with air pollution control efforts in other States, including other States' efforts to protect visibility. 42 U.S.C. § 7410(a)(2)(D)(i)(II). These provisions are referred to as the "interstate transport" provisions.

II. FACTUAL BACKGROUND.

When EPA revised the Haze Rule in 2005, the Agency required States to submit the relevant SIP revisions by December 17, 2007. *See* 76 Fed. Reg. at

16,171. At that time, States were also under an obligation to submit SIP revisions demonstrating compliance with the interstate transport provisions for certain NAAQS. In a 2006 guidance document, EPA recommended that States could meet one element of the interstate transport provisions—the visibility element—by submitting a regional haze SIP. *Id.* at 16,193. Oklahoma stated that it would submit a regional haze SIP revision by December 17, 2007, that would address the requirements of the interstate transport provisions. *See id.* at 16,172.

On January 15, 2009, EPA published a finding that Oklahoma and numerous other States and territories had failed to meet the December 17, 2007 deadline to submit a regional haze SIP. *See* 74 Fed. Reg. 2392 (Jan. 15, 2009). Accordingly, EPA acknowledged that it had an obligation under the CAA to promulgate a FIP for each of the listed States and territories within two years unless EPA subsequently received and approved a regional haze SIP for each of the named States and territories. *See id.* at 2393.

On February 19, 2010, Oklahoma submitted to EPA its regional haze SIP. Among other things, Oklahoma determined in the SIP that controlling SO_2 emissions from the Units would be too expensive and that the potential visibility benefits would not be substantial enough to justify installing additional control technology. *See* 76 Fed. Reg. at 16,186. Thus, Oklahoma concluded that BART for SO_2 should be the continued burning of low sulfur coal at the Units at an SO_2

emission rate of 0.65 lbs/MMBtu on a 30 day average. *See* JA141-42, 145. EPA reviewed Oklahoma's SIP for compliance with the CAA and the Haze Rule. *See* 76 Fed. Reg. at 81,732. After review, EPA disagreed with Oklahoma and found that SO_2 controls, such as the installation of dry flue gas desulfurization technology (commonly known as "scrubbers"), would cost-effectively reduce emissions and yield substantial visibility improvement. *See* 76 Fed. Reg. at 16,186-87; 76 Fed. Reg. at 81,739, 81,746. Because BART is an emission limitation, EPA did not mandate the installation of such scrubbers, but rather set an emission limit of 0.06 lbs/MMBtu on a 30-day average based on the amount of emissions reductions that could be achieved by their installation. 76 Fed. Reg. at 81,729. EPA also found that because Oklahoma's proposed emission rate was higher than that proposed by Oklahoma during regional modeling used by other States for the development of their visibility programs, the SIP did not ensure that emissions from Oklahoma would not interfere with other States' visibility programs. *See id.* at 16,194; 76 Fed. Reg. at 81,729. On March 22, 2011, EPA proposed to partially disapprove the SIP and promulgate a FIP to address Oklahoma's deficient BART determination for SO_2. *See* 76 Fed. Reg. at 81,728. EPA took comment on the Proposed Rule, and on December 28, 2011, EPA published a Final Rule consistent with its Proposed Rule. *See* 76 Fed. Reg. at 81,728.

SUMMARY OF THE ARGUMENT

The plain language of the CAA provides EPA a critical oversight role to ensure that States implement the CAA in accordance with the Act's requirements. This authority is the same whether EPA is reviewing a State's implementation of a NAAQS or a State's determination of BART under the CAA's regional haze provisions. Thus, contrary to the rubber-stamping role Petitioners advocate, the CAA provides EPA the authority and duty to substantively review Oklahoma's regional haze SIP.

Here, EPA concluded that Oklahoma's SIP failed to meet the requirements of the CAA's regional haze and interstate transport provisions, and the Haze Rule. Specifically, EPA found that Oklahoma failed to consider properly one of the five statutory factors—the costs of compliance factor—using the methodology required by the Haze Rule, which led to a faulty BART determination and a SIP that would not ensure that emissions from Oklahoma sources would not interfere with the visibility programs of other States. Accordingly, EPA had a duty to disapprove Oklahoma's SIP and promulgate a FIP to address the deficiencies.

The procedure by which EPA promulgated the Final Rule was proper under the Act. First, nothing in the CAA required EPA to split the Final Rule into two separate actions as Petitioners contend. Second, the CAA does not deprive EPA of its authority to promulgate a FIP after its deadline to do so has passed, or require

EPA to "reopen" the time in which to act by issuing a "new notice" before taking action. Petitioners' reading of the statute on these points is contrary to the plain language and purpose of CAA section 7410(c).

Furthermore, the technical determinations underlying the Final Rule are amply supported by the administrative record. The record demonstrates that because Oklahoma's cost estimates failed to follow a required Manual, Oklahoma's costs were inflated and prevented a meaningful comparison with the costs of similar projects; the record also supports EPA's use of the Manual and other information to adjust Oklahoma's cost estimates to allow for such a comparison. Next, the record demonstrates that Oklahoma's cost effectiveness analysis unfairly stacked the deck in favor of finding that installing scrubbers at the Units was not cost effective by using costs of an overdesigned scrubber system and underestimating the emissions reduced by that system; the record also supports EPA's solution to this mismatch. Lastly, the record demonstrates that EPA reasonably assessed the visibility improvements attributable to the installation of scrubbers at each source.

Finally, Petitioners had ample opportunity to comment on all key elements of the Final Rule. Accordingly, the Final Rule was promulgated in compliance with the notice-and-comment provisions of CAA section 7607(d). In summary, the

petitions for review must be denied.[2]

STANDARD OF REVIEW

Because the Final Rule is a "promulgation . . . of an implementation plan by the Administrator under section 7410(c)," 42 U.S.C. § 7607(d)(1)(B), CAA section 7607(d)(9) provides that the Court may reverse the Final Rule only if it is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right . . . ; (C) in excess of statutory jurisdiction, authority or limitations . . . or (D) without observance of procedure required by law. . . ." 42 U.S.C. § 7607(d)(1)(B)(9). This is the same standard of review as that provided in the Administrative Procedure Act. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519-20 (D.C. Cir. 1983). It is a narrow, deferential standard that prohibits the Court from substituting its judgment for that of the Agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court must consider whether the Agency's decision "was based on a 'consideration of the relevant factors and whether there has been a clear error of judgment.'" *Bowman Transp., Inc. v. Arkansas-Best*

[2] To the extent the amici briefs raise the same issues as Petitioners, EPA's argument also addresses their briefs. EPA notes, however, that PacifiCorp raises new challenges to EPA's visibility modeling. *See* PacifiCorp Brief 19-21. EPA has not addressed those challenges because no "exceptional circumstances" exist that would justify the Court's consideration of these new issues. *See Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000). Should the Court determine otherwise, EPA requests the opportunity to respond in supplemental briefing.

Freight Sys., Inc., 419 U.S. 281, 285 (1974) (citation omitted).

The Court reviews an agency's interpretation of a statute it administers under the familiar two-step framework established by the Supreme Court in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Chevron* requires that this Court consider "whether Congress has directly spoken to the precise question at issue[;]" if so, that is the end of the inquiry, and the Court must apply the plain terms of the statute. *Id.* If, however, this Court finds that Congress has not spoken directly to the precise question at issue, the Court must determine whether the Agency "based [its interpretation] on a permissible construction of the statute." *Id.* at 843. EPA's interpretations of its own regulations are entitled to even greater deference. They are given "'controlling weight' unless [they are] plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted).

EPA's factual findings are likewise entitled to substantial deference. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110-13 (1992). EPA's factual determinations should be upheld as long as they are supported by the administrative record, even if there are alternative findings that could be supported by the record. *Id*; *see also Morgan v. Sec'y of Housing & Urban Dev.*, 985 F.2d 1451, 1457 (10th Cir. 1993). Indeed, where the action at issue involves "'technical or scientific matters within

the agency's area of expertise[,]'" deference to the agency is "'especially strong.'" *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1045 (10th Cir. 2011) (citation omitted).

When reviewing challenges to the procedure by which a rule is promulgated, the Court may only overturn the rule when the agency's failure to observe procedure is arbitrary or capricious, was raised during the public comment period, *and* the procedural error was "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8), (d)(9) (referencing § 7607(d)(7)(B) and (d)(8)).

ARGUMENT

I. EPA ACTED WITHIN ITS CAA AUTHORITY.

Petitioners make three arguments challenging EPA's authority to promulgate the Final Rule: (1) that EPA lacked the substantive authority to reject Oklahoma's SIP because Oklahoma considered the factors required for determining BART and EPA may not evaluate the substance of such consideration; (2) that EPA lacked procedural authority to disapprove Oklahoma's SIP and simultaneously promulgate a FIP; and (3) that EPA lacked authority to act after its two-year timeframe under CAA section 7410(c) had passed absent issuing a "new notice" to "re-open" the statutory timeframe. As the discussion below explains, all of these

arguments are contrary to the plain language of the CAA. Therefore, the Court need not proceed beyond *Chevron* Step 1 to uphold EPA's Final Rule. However, if the Court determines that the Act is ambiguous, the following discussion also serves to support the Agency's interpretation of its authority under the statute as reasonable under *Chevron* Step 2.

A. The CAA Required EPA To Review The Substance Of Oklahoma's BART Analysis And Reject It.

The CAA represents "an experiment in cooperative federalism." *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). Generally, the Act assigns EPA the tasks of setting standards necessary for air quality protection and supervising and enforcing their implementation, while the Act assigns States the primary responsibility for implementing the standards through SIPs. *See* 42 U.S.C. §§ 7409-7410, 7491-7492; s*ee also Train v. NRDC*, 421 U.S. 60, 64-65 (1975) (explaining federal and state roles); *Virginia v. EPA*, 108 F.3d 1397, 1406-10 (D.C. Cir.) (explaining same after CAA amendments), *modified on reh'g by* 116 F.3d 499 (D.C. Cir. 1997).

The CAA does not, however, give States free reign to determine the content of their SIPs. "Congress clearly intended the final decision [on implementation plans] to be that of the EPA." *Mountain States*, 630 F.2d at 757; *see also Montana Sulfur & Chem. Co. v. EPA*, 666 F.3d 1174, 1181 (9th Cir. 2012) ("The Clean Air

Act gives the EPA significant national oversight power over air quality standards . . . .").

"Section [7410 of the CAA] governs the interplay between the states and EPA with respect to the formulation and approval of [SIPs]." *Virginia v. EPA*, 108 F.3d at 1406. Specifically, under section 7410, SIPs must include specific elements, *see* 42 U.S.C. § 7410(a)(2), States must submit SIPs to EPA for review and approval, *id.* § 7410(a)(1), and EPA must review SIPs for consistency with the Act's requirements. *Id.* § 7410(k)(3). In fact, the CAA mandates that EPA disapprove any SIP revision that "would interfere with any applicable requirement" of the Act. *Id.* § 7410(*l*). The Act even empowers EPA to call for SIP revisions "[w]henever [EPA] finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately the interstate pollutant transport described [in the Act], or to otherwise comply with any requirement of this chapter," and impose sanctions when EPA determines they are "reasonable and appropriate for the purpose of ensuring that the requirements [of the Act] . . . are met." *See id.* § 7410(k)(5), (m). Furthermore, the Act mandates that EPA promulgate its own plan, a FIP, when EPA finds that a State has failed to submit a required SIP to the Agency, failed to submit a complete SIP, or where EPA disapproves a SIP. *See id.* § 7410(c)(1); *see also Train*, 421 U.S. at 64, 79 (explaining that the 1970 CAA Amendments

"sharply increased federal authority and responsibility in the continuing effort to combat air pollution," including giving EPA authority to devise a FIP if the State's plan fails to satisfy the standards of section 7410(a)(2)). Thus, far from the empty, rubber-stamping role that Petitioners advocate, the CAA provides EPA with a critical oversight role to ensure that the requirements of the CAA are met through States' SIPs.

Contrary to Petitioners' contention, EPA's role is not different in the context of the CAA's regional haze provisions. To be sure, the statute provides States the first opportunity to make BART determinations, *see* 42 U.S.C. § 7491; s*ee also Am. Corn Grower*s, 291 F.3d at 8 ("Congress intended the states to decide . . . what BART controls should apply."). But the Act does not "delegate the power to determine BART exclusively to the States" as Petitioners assert. *See* Petitioners' Brief 41. CAA section 7410(a)(2)(J) explicitly requires that SIPs "meet the applicable requirements of . . .part C of this subchapter," which includes the CAA's regional haze provisions. 42 U.S.C. § 7410(a)(2)(J). When a SIP fails to do so, section 7410(c) provides EPA the authority to promulgate a FIP. *Id.* § 7410(c). Indeed, the regional haze provisions require that SIPs "contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal," *id.* § 7491(b)(2), and carry out the Haze Rule, *id.* § 7492(e)(2), and, importantly, require that States

submit such SIP revisions to EPA for review "*under section 7410*." *Id.* (emphasis added).

Moreover, the regional haze provisions explicitly state that section 7410(c) authorizes EPA to promulgate a FIP establishing BART when a State's BART determination is inadequate. *See id.* §§ 7491(b)(2)(A) (EPA's regulations must require major stationary sources to procure, install, and operate BART as determined by the State *or* EPA "in the case of a [FIP] promulgated under section 7410(c) . . . ."); 7491(g)(2) (requiring that the State *or* EPA, "in determining emission limitations which reflect [BART]," take the five statutory factors into consideration). Accordingly, the statute provides EPA a key oversight role in reviewing SIPs for compliance with the Act, including the CAA's regional haze provisions and BART requirements.

The cases Petitioners cite do not support Petitioners' argument that EPA's role as reviewer is any less critical in the regional haze context than it is in reviewing other SIP components. Indeed, none of the cases Petitioners cite directly address this issue. In *American Corn Growers v. EPA*, the petitioners challenged the original Haze Rule because, among other things, the Haze Rule treated one of the five statutory factors—visibility improvement—differently than the others by requiring States to consider the degree of visibility improvement from imposing BART on a group of sources rather than on a source-specific basis.

291 F.3d at 5-9. The court concluded that such a requirement could force States to apply BART controls at sources without evidence that the individual sources contributed to visibility impairment at a Class I area, which encroached on States' primary authority under the regional haze provisions to determine which individual sources are subject to BART and what BART controls are appropriate for each source. *Id.* at 7-8. Thus, without addressing EPA's authority to reject a State's BART determinations for failure to conform to the CAA or EPA's regulations, the court vacated the visibility improvement part of the Haze Rule as contrary to the statute.

Similarly, EPA's authority to reject States' BART determinations for consistency with the statute or its regulations was not at issue in *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006), either. In that case, the D.C. Circuit upheld EPA's 2005 amended Haze Rule, which, among other things, "authorize[d] state[s] to infer, from evidence that [their] BART-eligible sources *collectively* contribute to visibility impairment in at least one Class I area, that all such sources may reasonably be anticipated to cause or contribute to visibility at such an area . . . . [,]" and allowed states to substitute EPA's Clean Air Interstate Rule for BART. 471 F.3d at 1337-40. The court found that the first provision was consistent with the statute as long as individual sources could challenge the necessity of installing BART, and that the second provision was consistent with the

statute because it allowed "reasonable progress" toward the national goal of the regional haze provisions. *Id.*

Petitioners also cite *Luminant Generation Co. v. EPA*, 675 F.3d 917 (5th Cir. 2012); *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997); and *Florida Power & Light Co. v. Costle*, 650 F.2d 579 (5th Cir. 1981). None of these cases involves BART or the CAA's regional haze provisions at all. In any event, they support EPA's interpretation of its authority under section 7410 to review SIPs for compliance with the statute and EPA's regulations. *See Luminant*, 675 F.3d at 921 (explaining EPA's role as reviewer); *Virginia*, 108 F.3d at 1406-08 (same); *Florida Power*, 650 F.2d at 581 (same). In these cases, the courts simply found that EPA had acted beyond its role of ensuring that a SIP complied with requirements of the Act or EPA's regulations. *See Luminant*, 675 F.3d at 924, 929 (rejecting EPA's SIP disapproval because EPA failed to tie its disapproval to any requirement of the CAA); *Virginia*, 108 F.3d at 1408-10, 1413 (holding EPA could not condition approval of a SIP on the State's inclusion of a specific control measure); *Florida Power*, 650 F.2d at 587 (holding EPA could not insert a state variance into a SIP thereby converting a state variance into a federally enforceable SIP provision).

Here, EPA did not step outside EPA's role under CAA section 7410. Contrary to Petitioners' assertion, EPA did not disapprove Oklahoma's BART determination merely because it disagreed with how Oklahoma weighed the five

statutory factors; rather, EPA found that Oklahoma's consideration of one of the factors did not comply with the Act and the Haze Rule. Specifically, EPA concluded that Oklahoma failed to reasonably consider the "costs of compliance" factor by calculating costs as required by the BART Guidelines, which led to an "unreasoned and unjustified" BART determination. *See* 76 Fed. Reg. at 81,732. EPA also found that Oklahoma's SIP did not ensure that emissions from sources within Oklahoma would not interfere with other States' visibility protection measures in violation of the CAA's interstate transport provisions. *Id.* Thus, because Oklahoma's SIP did not "contain such emission limits, schedules of compliance, and other measures . . . necessary to carry out" the Act and the Haze Rule as required by section 7492(e)(2), and "interfere[d] with [an] applicable requirement [of the Act] concerning attainment" as prohibited by section 7410(*l*), EPA had a duty under the role provided EPA under section 7410 and the regional haze provisions to disapprove Oklahoma's SIP. *See* 42 U.S.C. §§ 7410(*l*), 7492(e)(2). As explained in Part II of the Argument *infra*, the record contains ample technical support for EPA's determination that Oklahoma's regional haze SIP failed to meet the requirements of the CAA and the Haze Rule, as well as support for EPA's promulgation of a FIP to address both the regional haze and interstate transport provisions of the CAA.

B. The Procedure By Which EPA Promulgated The FIP Was Proper.

As explained *supra*, procedural challenges can overturn an agency's final action if the agency's failure to observe procedure is arbitrary or capricious, was raised during the public comment period, *and* the procedural error was "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8) (referencing § 7607(d)(7)(B) and (d)(8)). Here, Petitioners can satisfy only one of these requirements—that Petitioners raised their procedural arguments in comments on the Proposed Rule. Accordingly, Petitioners' procedural challenges must fail.

1. The CAA Does Not Require That EPA Disapprove A SIP Revision Before And Separate From Promulgating A FIP.

EPA's procedural decision to disapprove Oklahoma's SIP and promulgate a FIP in one action was not arbitrary and capricious because the statute plainly imposes no requirement that EPA do so in two actions. In fact, under the plain language of the statute, EPA has a duty to promulgate a FIP *at any time* within two years after one of three triggering events occurs: (1) EPA finds a State has failed to submit a required SIP; (2) EPA finds a State's SIP is incomplete; or (3) EPA disapproves a SIP submission in whole or in part. 42 U.S.C. § 7410(c); *see also Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 224-25 (9th Cir. 1992)

(discussing the three triggering events).

Here, the first triggering event was EPA's January 15, 2009 finding that Oklahoma had failed to submit a regional haze SIP. 42 U.S.C. § 7410(c)(1)(A). Accordingly, EPA had a duty to promulgate a FIP by January 15, 2011. As explained more fully in Part I.B.2 *infra*, EPA's duty to do so did not cease once the two years expired. And nothing in CAA section 7410(c) required EPA to take action on Oklahoma's intervening SIP submission before promulgating a FIP or suggests that the two-year deadline for a FIP was tolled or obviated by the intervening SIP submission. *See* 42 U.S.C. § 7410(c); *see also Coal. for Clean Air*, 971 F.2d at 224-26 (finding that the first of any of the three triggering events starts EPA's obligation to promulgate a FIP within two years, and an intervening event—an Amendment to the CAA itself—did not obviate that duty); *Virginia v. United States*, 74 F.3d 517, 522 n.4 (4th Cir. 1996) (noting that EPA's finding a SIP incomplete triggered EPA's FIP duty, which could only be stopped by a subsequent SIP approval and could not be restarted by subsequent finding of completeness); *NRDC v. Browner*, 57 F.3d 1122, 1126 n.7 (D.C. Cir. 1995) (noting that section 7410(c) requires SIP approval before halting EPA's FIP duty).

Indeed, Petitioners leave out key statutory language in their effort to demonstrate "Congress's intention for States to have . . . the opportunity to correct a SIP before a FIP is issued"—Petitioners' focus on EPA's duty to promulgate a

FIP "'unless the State corrects the deficiency[,]'" *see* Petitioners' Brief 40 (quoting 42 U.S.C. § 7410(c)), but the statute goes on to add "*and* the Administrator approves the plan or plan revision, *before* the Administrator promulgates [the FIP.]" 42 U.S.C. § 7410(c)(1)(B) (emphasis added). Thus, while the statute provides States a potential grace period within which they can correct their deficient SIPs, the statute does not require EPA to wait for such corrections or even act on them before promulgating a FIP. *Id.; see also Ass'n of Irritated Residents v. EPA*, Nos. 09-71383, 09-71404, 2012 WL 251912, *5 (9th Cir. Jan. 27, 2012) (discussing the "grace period in which states can bring their plans into compliance before the FIP is enacted"); *WildEarth Guardians v. Jackson*, Nos. 11-cv-00001-CMA-MEH, 11-cv-00743-CMA-MEH, 2011 WL 4485964, *7 n.8 (D. Colo. Sept. 27, 2011) (noting that "EPA would nonetheless be authorized to promulgate a regional haze FIP" even if EPA has not taken final action on a SIP because the "duty remains '*unless* the State corrects the deficiency, *and* the Administrator approves the plan or plan revision, *before* the Administrator promulgates such [FIP].'") (quoting 42 U.S.C. § 7410(c)) (unpublished).

Furthermore, Petitioners provide no support for their contention that EPA could not identify the gaps or inadequacies of Oklahoma's SIP or provide an adequate statement of basis to support the FIP consistent with the CAA definition of a FIP and CAA section 7607(d)(3) until it took final action on the SIP. *See*

Petitioners' Brief 40-41. The Final Rule plainly identifies the gaps and inadequacies of Oklahoma's SIP—namely, Oklahoma's failure to reasonably determine BART—and fills them with the FIP. *See* 76 Fed. Reg. at 81,730 ("We are finalizing a FIP to address the defects in those portions of this SIP that are mandatory requirements that we are disapproving."). EPA's Proposed Rule was supported with a detailed notice of proposed rulemaking that satisfies the procedural requirements of CAA section 7607. *See* 76 Fed. Reg. at 16,168 ("EPA is proposing to . . . partially disapprove those portions addressing the requirements for [BART] . . . [and] proposing a [FIP] . . . to address these issues."); *see also id.* at 16,177-88 (detailing inadequacies). Accordingly, it is Petitioners who cannot credibly claim that disapproval of Oklahoma's SIP must precede promulgation of a FIP in order for the CAA's requirements to be satisfied.

Petitioners' reading of the statute, which would force EPA to issue two separate proposed rules, conduct two separate notice-and-comment periods, and promulgate two separate final rules, would only serve to delay Agency decisionmaking after an unnecessary expenditure of resources. Additionally, Petitioners' reading of the statue would render the two-year deadline in section 7410(c) meaningless because States could perpetually avoid compliance with the requirements of the CAA by submitting inadequate SIP after inadequate SIP, requiring EPA to continually disapprove those SIPs in an endless cycle of

administrative procedure that fails to accomplish the goals of the CAA. The statute plainly does not support such procedure and therefore the Court should reject Petitioners' procedural challenge to EPA's authority to promulgate a FIP simultaneously with its SIP disapproval. *Chevron*, 467 U.S. at 842-43 ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Moreover, even if the statute was not so clear and the Court could conclude that EPA's procedure was in error, EPA's decision to proceed with one action instead of two was certainly not "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8). As explained *supra*, the reasons EPA proposed to partially disapprove Oklahoma's SIP dictated the substance of EPA's FIP; thus, any comments Petitioners submitted on the SIP disapproval were relevant to the FIP promulgation and vice versa. EPA considered Petitioners' comments in determining whether to promulgate the Final Rule. Accordingly, Petitioners cannot claim that EPA would have acted differently if EPA had proceeded through two separate actions rather than one.

2. EPA Had Authority To Promulgate A FIP After The Two-Year Deadline Passed.

In the final paragraph of their argument, Petitioners contend that EPA had no authority to promulgate a FIP because EPA's two-year deadline under CAA section 7410(c) had passed at the time EPA promulgated the Final Rule and EPA did not provide a "new notice to re-open the two-year window." Petitioners' Brief 42. This argument deserves equally little attention from the Court because it does not comport with Supreme Court precedent or the statute.

First, EPA did not lose its authority to act after CAA section 7410(c)'s deadline passed. In *Brock v. Pierce County*, the Supreme Court held that "[w]hen . . . there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." 476 U.S. 253, 260 (1986). The Court noted that "[it] would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Id.* Thus, the Court found that because nothing in the statute at issue or its legislative history suggested that Congress intended to impose a jurisdictional limitation on agency action, and the Administrative Procedure Act provided a remedy for action unlawfully withheld or unreasonably delayed by authorizing a district court to compel such action, the agency was not divested of authority to act

beyond the statutory deadline. *Id.* at 260 n.7, 261-65. *See also United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009) (applying *Brock*).

The Ninth Circuit recently applied *Brock's* teaching to EPA's authority to promulgate a FIP under CAA section 7410(c), holding that EPA did not lose its authority to act after the deadline because the CAA provides less drastic remedies for EPA inaction. *See Montana Sulphur & Chem. Co. v. EPA*, 666 F.3d at 1190-91. Indeed, the CAA provides a very specific remedy for EPA's failure to promulgate a FIP by the statutory deadline—an order by a district court compelling the Agency to take action. *See* 42 U.S.C. § 7604(a)(2). This remedy is evidence that Congress did not intend EPA's CAA duties to cease once a statutory deadline has passed. *See General Motors Corp. v. United States*, 496 U.S. 530, 541 (1990) (holding EPA can enforce SIP even when it has delayed action on a revision).

Second, Petitioners cite no support for the proposition that EPA has the authority or obligation to "reopen" the statutory window by issuing a "new notice" because there is none. *See* 42 U.S.C. § 7410(c). Such authority would render the deadline in section 7410(c) meaningless because EPA could perpetually extend its time within which to promulgate a FIP by issuing new notices. Citizens, in turn, would lose the ability to enforce EPA's duty to promulgate a FIP within two years of a section 7410(c) triggering event. Such an argument fails to serve the purpose of the CAA as a whole or section 7410(c) specifically, let alone comport with the

statute's plain language. In summary, the procedure by which EPA promulgated the Final Rule was well within the Agency's authority under CAA. Accordingly, EPA's action after the deadline was not arbitrary and capricious and did not constitute a procedural error sufficient to invalidate the Final Rule under CAA section 7607(d)(9)(D).

II. EPA'S TECHNICAL DETERMINATIONS IN DISAPPROVING THE SIP AND PROMULGATING A FIP ARE SUPPORTED BY THE RECORD.

In addition to advancing statutory arguments for invalidating EPA's action, Petitioners also take issue with several of EPA's technical determinations underlying the Final Rule. In reviewing such determinations, the Court must give the Agency "especially strong" deference. *San Juan Citizens Alliance*, 654 F.3d at 1045.

A. EPA Reasonably Rejected Oklahoma's Estimates Of The Cost Of The Controls.

As explained *supra*, the CAA requires that States consider the "costs of compliance" in making BART determinations. 42 U.S.C. § 7491(g)(2). In the Guidelines, which are mandatory for BART determinations for the Units, *see* 42 U.S.C. § 7491(b)(2) (last sentence); 40 C.F.R. § 51.308(e)(1)(ii)(B), EPA interpreted "costs of compliance" in terms of "cost effectiveness," and instructed States to use a three-step approach to evaluating cost effectiveness: "(1) Identify the emissions units being controlled, (2) Identify design parameters for emissions

controls, and (3) Develop cost estimates based upon those design parameters." 70 Fed. Reg. at 39,166. Only the third step is at issue here.

The Guidelines require States to estimate the costs of controls using EPA's Control Cost Manual ("Manual"). *Id.* The Manual "addresses most control technologies in sufficient detail for a BART analysis[,]" but when the Manual does not sufficiently address the needs of a particular source, States have some flexibility to supplement their analyses with other information. *Id.* at n.15. In fact, the Guidelines require that site-specific design or other conditions be taken into account if they affect the cost of a control. *Id.* If supplementation is needed, or site-specific conditions are used, States are required to document any additional information used for any element of their calculations that differs from the Manual. *Id.*

Here, EPA rejected Oklahoma's estimates of the cost of installing scrubbers. 76 Fed. Reg. at 81,744-45. These estimates were derived from Oklahoma's consideration of estimates submitted to the Oklahoma Department of Environmental Quality ("ODEQ") by OG&E in 2008 and 2009 ("2008 estimates" and "2009 estimates," respectively). *See* Response to Comments ("RTC"), JA1236.[3] Petitioners' assertion that EPA ignored the 2008 estimates is unfounded. In its role as reviewer of the Oklahoma SIP, EPA reviewed ODEQ's entire SIP,

[3] Unless clear from the text, citations to the Joint Appendix ("JA") are preceded by a description of the relevant document.

including its BART analysis. *Id.* ODEQ's BART analysis specifically refers to OG&E's 2008 estimates. *See* JA198, 201; *see also* 76 Fed. Reg. at 16,183 (In the proposed rule, EPA stated, "Both ODEQ and we used . . . BART evaluations performed by OG&E . . . ."). Additionally, EPA's Response to Comments specifically addresses the 2008 estimates. *See* JA1236 ("These 2008 costs are not valid under the overnight method."). Because neither estimate complied with the Manual and neither provided justification for departing from the Manual, EPA thus concluded that both estimates contained "fundamental methodological flaws." JA1233- 36.

Specifically, the Manual requires that costs of controls be calculated as if the project would be paid for up front rather than over the course of the installation of the control, which is commonly called the "overnight method" or described as evaluating costs using "current dollars." *Id.* at 1235, 1240-41; 76 Fed. Reg. at 81,744. This means costs must be estimated as of the current year, rather than escalated to the year of operation of the control. JA1240; *see also* Manual, JA1681 ("[Equivalent Uniform Annual Cash Flow] works best when the [sic] is only one capital investment to incorporate and annual cash flows are constant or normalized to one year, typically year zero."); JA1677 (Table 2.1 shows year zero as prior to the date of operation); JA1678 (Figure 2.5 shows the same). Additionally, the Manual excludes certain future costs like interest on funding for construction

("allowance for funds used during construction" or "AFUDC"), excessive contingencies, fees incurred to finance the project, and inflation. *See* Fox Report, JA1518-30; *see also* Manual, JA2071, 2133 (Tables 1.4 and 2.5 show AFUDC value as zero), JA1691(discussing contingencies), JA1697 (discussing inflation). The Manual requires the use of current dollars because cost effectiveness is a relative determination—a control will be cost effective if the cost is similar to costs borne by other similar projects. *See* RTC, JA1236-37, 1240-41; Fox Report, JA1516-18. One can only compare costs of such projects if they are calculated in the same manner using dollars from the same time period. RTC, JA1236-37. In other words, the Manual requires an approach that allows a comparison of apples to apples.[4] *See id.*

EPA was surprised by Oklahoma's high cost estimates because scrubbers are usually found to be "highly cost-effective controls for power plants" like OG&E's.[5] *See* 76 Fed. Reg. at 16,182; *see also* EPA Comments on 2008

[4] EPA has consistently required the constant dollar or overnight approach in the context of BART determinations. *See, e.g.*, 77 Fed. Reg. 20,894, 20,916-17 (Apr. 6, 2012) (explaining in support of the North Dakota Regional Haze FIP, "we maintain that following the overnight method ensures equitable BART determinations . . . ."); 76 Fed. Reg. 52,388, 52,399-400 (Aug. 22, 2011) (explaining in the New Mexico Regional Haze FIP that the Manual does not allow AFUDC).

[5] Oklahoma estimated costs at approximately $6,000-$7,000/ton of SO_2 emissions removed for the Sooner Units and $7,500/ton for the Muskogee Units. *See* 76 Fed. Reg. at 16,183. By contrast, in the Final Rule, EPA estimated (footnote cont'd . . .)

Estimates, JA1132. Accordingly, EPA retained a consultant, Dr. Phyllis Fox, to assist in evaluating Oklahoma's cost estimates for compliance with the Manual. *See* 76 Fed. Reg. at 16,182. Dr. Fox found that instead of the overnight method, OG&E's 2008 and 2009 estimates were calculated using an "all-in method," which projected costs up to the commercial operating date of the installed scrubbers in 2014 and 2015. *Id; see also* JA1517. After thoroughly reviewing Dr. Fox's report and the suitability and costs of installing scrubbers, *see* 76 Fed. Reg. at 16,182, 76 Fed. Reg. at 81,735, EPA agreed with Dr. Fox and found that "OG&E's 2014 and 2015 all-in costs are much higher than the corresponding overnight costs, as prescribed by the [Manual,]" which made "the estimated cost of scrubbers . . . appear to be higher than scrubbers required at other similar facilities costed using the overnight method." 76 Fed. Reg. at 81,744.

Petitioners ask the Court to engage in an evaluation of the parties' consultants. *See* Petitioners' Brief 19 nn.8-9. However, agencies are entitled to rely on their own qualified experts, even if the court might find another view more persuasive. *See San Juan Citizens Alliance*, 654 F.3d at 1057. With over thirty-five years of experience in the field of environmental engineering, including work on numerous air pollution control projects, Dr. Fox is plainly qualified to evaluate

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costs at $1,239-$2,747/ton and $1,276-$3,032/ton, respectively. *See* 76 Fed. Reg. at 81,746.

Oklahoma's cost estimates. *See* Fox Resume, Supplemental Appendix ("SA"), SA1-33. Additionally, although Dr. Fox did not visit the Units or consult with OG&E and its consultant, EPA had "extensive communications [with OG&E and their consultants] clarifying particular technical points[,]" the substance of which was provided to Dr. Fox and incorporated into her report. 76 Fed. Reg. at 81,735. OG&E also had a full opportunity to provide additional cost information to EPA during the comment period. Accordingly, OG&E cannot now complain that EPA was "missing information" relevant to the cost effectiveness analysis.

Indeed, Petitioners do not dispute Dr. Fox's and EPA's conclusions that the 2008 and 2009 cost estimates escalated costs to 2014 and 2015 or point to a lack of evidence in the record that such conclusions were accurate. Rather, Petitioners report out of context EPA's alleged "acknowledgement" that the 2008 estimates were done in accordance with the Manual, argue that the 2009 estimates were done in compliance with the "constant dollar" method allowed by EPA and the Manual, and contend, without support, that EPA must defer to Oklahoma's unsupported determination that the 2009 estimates were "credible, detailed, and specific for the individual facilities." Petitioners' Brief 20, 23, 30-31.

Petitioners misconstrue EPA's alleged "acknowledgement" that the 2008 estimates were done in compliance with the Manual. *See* JA1132. In preliminary comments on the 2008 estimates, EPA merely acknowledged that OG&E used the

Manual, not that the estimates were done properly in accordance with the Manual. *Id.* Indeed, in the same letter, EPA noted that "OG&E's estimates seem high compared to what EPA has seen in other BART analyses . . . ." and encouraged OG&E to "note any areas [sic] where it has deviated from [the Manual]." *Id.*

Petitioners also misconstrue a statement by Dr. Fox regarding "constant-dollar costs" as a "claim" by EPA "that the [Manual] required compliance with the 'constant dollar' approach." Petitioners' Brief 31. In explaining one aspect of the Manual's method—the elimination of inflation, Dr. Fox states that "the cost metric estimated in the Manual is real or constant-dollar costs in that the effect of inflation has been removed." JA1517. Throughout her report, however, Dr. Fox explains that not only does the Manual eliminate inflation, but the Manual also requires the use of current dollars and excludes future costs that OG&E included as part of their "all-in" or "levelized cost" method of estimating costs. *See id.* ("BART is based on present dollars."); JA1517-22 (addressing specific future costs and escalation).[6]

[6] Petitioners cite the Wroble declaration attached to their Motion for Stay of Final Rule to support their claim that the constant dollar approach was appropriate under the Manual. Petitioners' Brief 31. The Wroble declaration may not be considered by the Court because it is not part of the Final Rule's administrative record. *See* 42 U.S.C. § 7607(d)(7)(A). Petitioners attempt to get around this rule by stating that they cite the Wroble declaration solely to raise points that they would have raised if they had had a chance to comment on the "overnight method." Petitioners' Brief 31. This is a red herring. As explained in Part III of the Argument *infra*, Petitioners had ample opportunity to comment on EPA's use of the Manual to evaluate the cost estimates, regardless of the terminology EPA used to characterize the Manual's methodology. Indeed, Dr. Fox's Report was (footnote cont'd . . .)

Thus, although OG&E may have adjusted the 2009 estimates for inflation, OG&E's comments and EPA's responses reveal that OG&E escalated costs to the years of operation of the scrubbers, and that OG&E included AFUDC, bond costs, inappropriate contingencies, and an inappropriate capital recovery factor—all of which EPA identified as not conforming with the Manual. *See* RTC, JA1236, 1239-42.

Furthermore, there is no record support for Oklahoma's conclusion that OG&E's 2009 estimates were "credible." Indeed, EPA found that Oklahoma did not question OG&E's estimates notwithstanding OG&E's lack of compliance with the Manual. JA1517. EPA explained in the Response to Comments that it could not accept the 2009 estimates because OG&E did not provide justification for the vendor quotes it used as required by the Guidelines. JA1239. Accordingly, EPA reasonably rejected the 2008 and 2009 estimates for failure to comply with the requirements of the Guidelines.

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discussed at length in the Proposed Rule and Petitioners commented on it. *See* 76 Fed. Reg. at 81,735. In any event, the portion of the Manual cited by Wroble does not support Petitioners' argument that OG&E complied with the Manual solely by eliminating inflation—Chapters 2.3 and 2.4 generally describe basic financial concepts and do not instruct readers to use the "all-in" method that OG&E used.

B. EPA's Cost Estimates Were Reasonable And Consistent With The Manual.

Because OG&E included costs up to the year of operation of the scrubbers in 2014 and 2015 dollars rather than current dollars and included costs excluded by the Manual, the 2009 estimates did not allow an apples-to-apples comparison with other projects. *See* RTC, JA1236. Instead, Oklahoma compared the cost of scrubbers in 2014 and 2015 dollars to the costs of projects estimated in 2009 dollars, an apples-to-oranges comparison that skewed the cost analysis against a finding that scrubbers were cost-effective. JA1236, 1240. In order to address Oklahoma's apples-to-oranges comparison, EPA reasonably adjusted the 2009 estimates to current dollars using the method described in the Manual in order to compare the cost effectiveness of the scrubbers with other similar projects in 2009 dollars. *See generally* Fox Report, JA1509-10, 1518-42. Petitioners argue that EPA did not have the authority to conduct such a line item review, and also take issue with several of EPA's specific adjustments. Petitioners' Brief 30-36.

As explained in Part I of the Argument *supra*, EPA does in fact have authority under the CAA to conduct a review of the entire Oklahoma regional haze SIP, which includes Oklahoma's 2009 estimates. Petitioners cite no authority to support their contention that EPA's line item review of the 2009 estimates is precluded under EPA's role as reviewer of SIP revisions—EPA necessarily reviewed the substance of Oklahoma's cost estimates to determine if the estimates

were done in accordance with the Manual required by the Guidelines. *See* 42 U.S.C. § 7492(e)(2) (requiring States to submit regional haze SIP revisions for EPA's review under section 7410 for compliance with the Haze Rule).

With respect to EPA's adjustments, Petitioners first contend that EPA arbitrarily departed from the Manual when it used site-specific factors for property taxes, insurance, and administrative charges instead of the Manual's higher factors. Petitioners' Brief 33. As explained *supra*, the Guidelines allow use of site-specific information when such information is documented. *See* 70 Fed. Reg. at 39,166 n.15. EPA explained that EPA accepted OG&E's site-specific information "when available and correct." RTC, JA1273. Indeed, EPA used OG&E's own documented property tax and insurance information, citing to publicly available information on various websites, as well as a report by OG&E's consultants. *Id.* nn.118-19. Thus, EPA had a reasonable basis to depart from the generic numbers provided by the Manual for the purposes of property taxes and insurance.

Next, Petitioners contend that EPA excluded without support owner's costs on the assumption that OG&E double-counted such costs. Petitioners' Brief 33. Owner's costs are costs incurred by the owner in managing and implementing a capital project. Fox Report, JA1527. EPA explained that these costs were included twice in OG&E's estimates—once as a separate indirect capital cost factor and once as part of the engineering/procurement cost factor. RTC, JA1254-

55. As EPA explained, the Manual does not provide that owner's costs be separately included for the purposes of BART cost effectiveness analysis. JA1255. Indeed, Dr. Fox explained that including such line items twice was not appropriate because owners typically do not incur these costs on their own, but rather hire engineering firms to handle such functions, which costs are included as engineering/procurement costs. Fox Report, JA1527. Notably, OG&E did not dispute that such was the case in their comments or in their brief. Accordingly, EPA had a reasonable basis under the Manual for eliminating the double-counted owner's costs.

Petitioners also contend that EPA arbitrarily cut engineering/procurement and contingency costs. Petitioners' Brief 33. Petitioners do not articulate how EPA's treatment of these costs was arbitrary, but in any event, EPA adequately explained that a portion of OG&E's engineering/procurement costs were also double-counted because OG&E added vendor quotes for the design and supply of the scrubbers on top of the separate engineering/procurement cost factor. RTC, JA1255-56. Because the vendor quotes already included some of the engineering/procurement costs, EPA reasonably adjusted OG&E's costs and applied OG&E's engineering/procurement cost factor only to costs not included in the vendor quotes.

Likewise, EPA explained its reduction of OG&E's contingency factor in the Fox Report and Response to Comments.[7] JA1246. Under the Manual, "contingency" has a specific meaning. *Id.* "'A contingency factor should be reserved (and applied to) only those items that could incur a reasonable but unanticipated increase but are not directly related to the demolition, fabrication, and installation of the system.'" *Id.* (quoting Manual, JA1691). OG&E used a different definition of "contingency" and applied a 14% contingency to all project costs, including demolition, fabrication, and installation. RTC, JA1246. To address this error, EPA estimated a contingency of 3%, which is the generic figure provided by the Manual for contingencies associated with the installation of equipment most similar to the scrubbers proposed for the OG&E facilities—a wet scrubber for acid gases and a baghouse. *Id.* EPA further pointed out that the 3% contingency is significantly higher than the 0.7% contingency applied by one of OG&E's competitors to nearly identical units. JA1247. Accordingly, EPA reasonably reduced OG&E's exorbitant contingency factor.

Finally, Petitioners take issue with EPA's use of a 30-year useful life for the scrubbers at the OG&E facilities to calculate the cost recovery factor in the cost effectiveness analysis. Petitioners' Brief 34-36. The cost recovery factor reflects

[7] The pages of the Response to Comments cited in Petitioners' Brief do not refer to contingency costs. EPA assumes for the purpose of responding to this argument that Petitioners meant to cite JA1246 of the Response to Comments.

the costs and cash flows of a project over its lifetime; the lower the cost recovery factor, the lower the annual capital cost, which increases the cost effectiveness of a control. *See* Fox Report, JA1521-22. The longer the useful life of a control, the lower the cost recovery factor. Thus, a longer useful life increases the cost effectiveness of a control. *Id.*

The Manual does not provide the useful life of a scrubber; it provides a default 20-year useful life for two other control systems—selective catalytic reduction ("SCR") and a fabric filter baghouse.[8] RTC, JA1264. EPA therefore looked to several other sources to determine the appropriate useful life of scrubbers. *Id.* at 1263. First, EPA explained that scrubber vendors reported that the useful life was equal to that of a boiler, which can be more than 60 years. *Id.* Second, EPA identified several scrubbers that were installed between 1975 and 1985 that are still in use today. *Id.* Third, EPA cited a standard cost estimating handbook, a published paper, and a report used by OG&E's consultants that uses 30 years as the typical useful life of a scrubber. *Id.* Fourth, EPA pointed to a 1981 agency publication as evidence that EPA has been assuming a 30-year useful life for scrubbers for many years. *Id.* EPA also pointed out that OG&E originally used

[8] In responding to OG&E's comments regarding the useful life for these systems, EPA noted that the Manual cited a 1980 report as support for the 20-year useful life, that the report also stated that a fabric filter can last much longer than 20 years, and that significant advances had been made in material construction and baghouse design since the publication of the article. JA1264.

a 25-year useful life in the 2008 estimates and lowered the number to 20 years without explanation. *Id.* Accordingly, there is ample support in the record for EPA's use of a 30-year useful life in EPA's cost effectiveness analysis.

Petitioners misconstrue EPA's discussion of OG&E's planned continued use of low sulfur coal as it relates to the useful life of a scrubber. Petitioners' Brief 34-35. EPA did not cite to OG&E's planned continued use of low sulfur coal as support for the 30-year useful life as Petitioners contend; rather, EPA responded to OG&E's comment that EPA should take into account the severity of the environment in which the control system is installed when determining the useful life. RTC, JA1264. EPA explained that scrubbers capable of cleaning higher sulfur coal already have been demonstrated to last 30 years, and the use of low sulfur coal will produce a milder environment than the use of higher sulfur coal. *Id.* In any event, the Guidelines require the cost analysis to take into account site-specific design or other conditions that affect the cost of a control. *See* 70 Fed. Reg. at 39,166. [9]

[9] Petitioners cite a *proposed* Region 9 FIP and a letter by EPA Region 8 sent prior to a proposed rule involving two other power plants in support of their contention that "EPA has required the use of a 20—or even 15—year useful life for similar controls . . . ." Petitioners' Brief 35. First, Petitioners did not cite these examples in their comments so EPA had no opportunity to address them and they are not part of the record in this case. Accordingly, this argument is waived. *See* 42 U.S.C. § 7607(d)(7)(B) (first sentence). If EPA had had the chance to respond to these examples, it would have pointed out that the control evaluated by Region 9 for the Four Corners Power Plant was SCR not scrubbers, so the example is not pertinent,

In summary, EPA reasonably rejected Oklahoma's cost estimates as not compliant with the Manual, and therefore not compliant with the Guidelines or the CAA. EPA also reasonably adjusted the 2009 estimates to conform to the requirements of the Manual. Thus, Petitioners' claim that EPA's cost estimates were arbitrary and capricious should be rejected.

C. EPA Reasonably Rejected Oklahoma's Cost Effectiveness Analysis and Utilized Its Own Cost Effectiveness Analyses.

Average cost effectiveness is "the total annualized costs of control divided by annual emissions reductions." 70 Fed. Reg. at 39,167. Annual emissions reductions are calculated as the "difference between baseline annual emissions and the estimate of emissions after controls." *Id.* The Guidelines require that the baseline emissions rate "represent a realistic depiction of anticipated annual emissions for the source," and advise that baseline annual emissions are *generally* "based upon actual emissions from a baseline period." *Id.* at 39,167. However, the Guidelines do not require that past actual emissions be used as the baseline annual emissions from which to measure emissions after controls. *Id.* at 39,167.

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and that many site-specific factors affect the useful life of control technology, so Region 8 and 9's reasons for allowing a 15- or 20-year useful life may not apply to Region 6's determination of a 30-year useful life for the analysis for scrubbers at OG&E's facilities. Additionally, EPA could have pointed to its recent decision to apply a 30-year useful life to SCR in the New Mexico regional haze FIP. *See* 76 Fed. Reg. 52,388, 52,401-02 (Aug. 22, 2011).

Here, Oklahoma's cost effectiveness analysis (conducted by OG&E's consultant, Sargent & Lundy) contained a mismatch that affected both parts of the formula for evaluating cost effectiveness by inflating the costs of control and underestimating anticipated emissions reductions, which led to an erroneous determination that scrubbers would not be cost effective. RTC, JA1280-81; 76 Fed. Reg. at 81,745. First, in addition to inflating costs by failing to use the overnight method in the Manual, OG&E also used vendor quotes for a costlier scrubber than it needed. RTC, JA1280-81. Specifically, OG&E requested a quote for a scrubber system designed to remove 95% of SO_2 from a coal with 1.176 lb SO_2/MMBtu sulfur content while the boiler operated at 100% capacity. *Id.* at 1280. Historically, OG&E has burned coal with 0.51 lbs SO_2/MMBtu sulfur content—less than half the sulfur content OG&E assumed for purposes of pricing the scrubbers—while operating at 78.5% capacity. *Id.* [10] Thus, the quotes OG&E used were for a scrubber system that was more capable and thus costlier than what OG&E actually needed as indicated by OG&E's past operating history. *Id.*

[10] The figures on JA1276 of the Response to Comments provide a helpful illustration. OG&E asked for vendor quotes for a scrubber system capable of treating coal burned during the two outlier points in each of the two figures (the two points located towards the top of the figures) even though OG&E burned much lower sulfur content coal during the remainder of the previous six years (the band of numerous points located toward the middle of the figures). *See* RTC, JA 1274-76.

Second, in order to determine the amount of emissions reductions attributable to the installation of scrubbers, OG&E assumed low sulfur coal would be burned both before and after the installation of the costlier scrubbers rather than calculating emissions reductions from burning a higher sulfur coal that matched the costlier scrubbers. RTC, JA1281. Thus, OG&E underestimated cost effectiveness by designing a costlier scrubber than needed and under-predicting the amount of SO_2 emissions that would be removed by the scrubbers. This had the effect of inflating the cost per ton of SO_2 removed so that scrubbers could not be found cost effective. *Id.*

The mismatch in OG&E's cost effectiveness analysis presented a conundrum for EPA because the Guidelines require that "future operating parameters," including "capacity utilization" and "type of fuel," be made into enforceable limitations if they have a deciding effect on the BART determination. *See* 70 Fed. Reg. at 39,167; *see also* RTC, JA1281-82. [11] Thus, EPA had to reconcile the overdesigned, costlier scrubber with OG&E's operating history. To do so, EPA made two adjustments to OG&E's analysis—EPA's so-called "Option

[11] Although the Guidelines only provide an example of when future operations would make the historical baseline emissions too high, EPA interpreted the Guidelines as also requiring that baseline emissions be realigned to account for future changes in operations when future operations would make the historical baseline emissions too low. *See* RTC, JA1281-82. Given the Guideline's goal for cost effectiveness analyses be realistic depictions of future anticipated conditions, EPA's interpretation was reasonable and entitled to deference.

1" and "Option 2." *See* 76 Fed. Reg. at 81,745; RTC, JA1233, 1280. As an initial matter, Petitioners attack EPA's Options as "fictional scenarios," Petitioners' Brief 25, but the entire point of cost effectiveness analyses is to assess appropriate controls whose future estimated benefits can be weighed against their estimated costs. *See* 70 Fed. Reg. at 39,167. In short, the aim of the Guidelines is that the analysis result in a "realistic depiction" of future operating conditions after installation of the controls, and EPA's Options 1 and 2 get much closer to the mark than OG&E's mismatched scenario that bears little resemblance to any scenario the company is likely to face.

In Option 1, EPA raised the historical emission baseline to match the potential reductions from the higher sulfur content of the coal that the scrubber was designed to clean. RTC, JA1233, 1280. In doing so, EPA did not take issue with OG&E's overdesign of the scrubber, recognizing that the overdesign would allow OG&E to burn cheaper coal with higher sulfur content and operate at a higher capacity in the future should the need to do either arise. JA1280. Indeed, because OG&E itself requested that the scrubbers be designed to accommodate higher sulfur coal, JA1233, 1280, EPA's consultant assumed this was OG&E's intended future operating scenario because it would allow them greater flexibility. *See* Fox Report, JA1513. EPA also gathered data showing that OG&E's coal sulfur content and SO_2 emissions have been trending up over time. RTC, JA1279. Accordingly,

in Option 1, EPA reasonably analyzed the cost effectiveness of the scrubbers to account for the possibility that OG&E would opt to increase coal sulfur content in the future and found that under Option 1, scrubbers would be cost effective. JA1233; 76 Fed. Reg. at 81,745.

EPA's Option 2 addressed OG&E's mismatch by adjusting the design of the scrubber system to match the emissions corresponding to the historically-burned lower sulfur coal. RTC, JA1280. Petitioners claim that Option 2 is technically infeasible and therefore not a valid cost effectiveness analysis. Petitioners' Brief 29. In response to OG&E's comments to the Proposed Rule on this issue, EPA adjusted its prior analysis under Option 2 by using a more precise, site-specific method of estimating the cost of a scrubber that would suit OG&E's needs. *Id.* at 1283-84. Instead of using the mathematical approximation (the "sixth-tenth" rule) that EPA had used in the Proposed Rule to estimate the cost of a more appropriate scrubber, which EPA acknowledged was an oversimplification, EPA used a Cost Development Methodology that had been designed by Sargent & Lundy (OG&E's consultants) for EPA in the context of another action. *Id.*; *see also id.* at 1283, n.130; 76 Fed. Reg. at 81,745. The Methodology includes certain design algorithms for dry scrubbers that allowed EPA to plug in the parameters of OG&E's Units and estimate the difference in the capital cost of a scrubber system for OG&E's Units when burning coal containing the high and low sulfur coal

(1.176 lb SO_2/MMBtu and 0.509 lb SO_2/MMBtu) assuming a 100% capacity factor. RTC, JA1283-84. The analysis demonstrated that the use of lower sulfur coal would significantly reduce the capital cost of the scrubber system appropriate for the Units. *Id.*

Additionally, contrary to Petitioners' contention that sulfur content is irrelevant to the design of scrubber systems, *see* Petitioners' Brief 28, EPA explained in the Response to Comments, quoting OG&E's own consultant, "'Several input variables are required in order to predict future retrofit costs [for a spray dryer absorber]. The gross unit size in MW . . . *and sulfur content* of the fuel are the major variables.'" RTC, JA1285 (quoting Sargent & Lundy, IPM Model—Revisions to Cost and Performance for APC Technologies, August 2010, p. 1) (emphasis added). Because the Methodology EPA used for Option 2 in the Final Rule took these variables and other technical considerations into account, EPA reasonably demonstrated that the installation of a scrubber system that matched OG&E's historic use of low sulfur coal was cost effective under Option 2. Thus, using Options 1 and 2 together, EPA reasonably addressed OG&E's mismatch and demonstrated that regardless of whether OG&E continues to burn the lower sulfur coal or burns higher sulfur coal, EPA's SO_2 BART determination remains cost-effective.[12]

[12] Petitioners argue that the scrubber system analyzed in (footnote cont'd . . .)

D. EPA's Visibility Analysis Was Reasonable.

Under the Guidelines, the final step in the BART determination is assessing visibility impacts—"the degree of visibility improvement for each source subject to BART." 70 Fed. Reg. at 39,170. Like the other factors, visibility improvement must be assessed for each source that is reasonably anticipated to "cause or contribute" to visibility impairment. 42 U.S.C. § 7491(b)(2)(a), (g)(2). A 1.0 deciview change or more from an individual source "causes" visibility impairment, while a change of 0.5 deciviews "contributes" to impairment. 70 Fed. Reg. at 39,120. The Guidelines instruct states to use "CALPUFF, or other appropriate dispersion model to determine the visibility improvement expected at a Class I area from the potential BART control technology applied to the source[,]" to "run the model, at pre-control and post-control emission rates" "for each source," and to "[a]ssess the visibility improvement based on the modeled change in visibility impacts for the pre-control and post-control emission scenarios." 70 Fed. Reg. at 39,170. The Guidelines further suggest that visibility improvements be assessed using a comparison threshold or by comparing "the 98th percent days for the pre- and post-control runs." *Id.*

Option 2 would reduce operating capacity and "would preclude OG&E from producing electricity at higher levels when needed." Petitioners' Brief 28-29 n.18. This argument is incorrect—as stated *supra*, EPA assumed a 100% capacity factor under Option 2 in the Final Rule using the Methodology discussed *supra*. RTC, JA 1283-84.

Here, EPA determined the visibility improvement expected at four Class I areas within a 300 km radius of the Muskogee and Sooner facilities due to the installation of scrubbers at each of the facilities. TSD, JA1479. Consistent with the Guidelines, EPA assessed visibility improvement by comparing the 98th percentile of impacts relative to natural background, as estimated using the CALPUFF air quality modeling system. JA1480. For the Sooner facility, EPA found a maximum visibility improvement of 2.08 deciviews at the four Class I areas combined, and an improvement of 1.05 deciviews at the Class I area most impacted by the installation of scrubbers (the Wichita Mountains). JA1498. For the Muskogee facility, EPA found a maximum visibility improvement of 3.06 deciviews at the four Class I areas combined, and an improvement of 0.84 deciviews at the Class I area most impacted (the Upper Buffalo area). *Id.* Thus, EPA found significant visibility improvement at the four Class I areas due to the installation of scrubbers at each facility. *See* 76 Fed. Reg. at 81,736, 81,739.

Additionally, EPA found that "visibility improvements anticipated from the installation of dry scrubbers at each facility will result in reducing modeled impacts . . . from each facility at [each] nearby Class 1 area[] to levels below 0.5 [deciviews], with improvements greater than 1.0 [deciviews] at some Class 1 areas." *Id.* at 81,739. EPA also evaluated the number of days that each facility would cause or contribute to visibility impairment after installation of scrubbers

and found that installation of scrubbers would "almost completely eliminate days when any of the . . . BART units have perceptible impact . . . . [and] significantly decrease the number of days that have a 0.5 deciview impact (or greater)." *Id.*

Petitioners suggest that EPA's findings are insignificant because visibility improvements would be "nearly imperceptible" and that "[w]ith one exception, the incremental visibility improvements projected to result from the addition of scrubbers to each of the OG&E Units are less than 1.0 [deciview] at each Class I area." Petitioners' Brief 36. While it is true that the deciview improvement at each Class I area due to the installation of scrubbers at each facility is estimated to be less than 1.0 deciview (with one exception), *see* TSD, JA1495, EPA's findings are far from insignificant under the Haze Rule. Indeed, the preamble to the Haze Rule states that "[f]ailing to consider less-than-perceptible contributions to visibility impairment would ignore the CAA's intent to have BART requirements apply to sources that contribute to, as well as cause, such impairment." 70 Fed. Reg. at 39,129. In the Final Rule, EPA explained, "[g]iven that sources are subject to BART based on a contribution threshold of no greater than 0.5 deciviews, it would be inconsistent to automatically rule out additional controls where the improvement in visibility may be less than 1.0 deciview or even 0.5 deciviews." 76 Fed. Reg. at 81,739. Indeed, EPA's view is consistent with the CAA's "national goal" to prevent future and remedy existing manmade visibility

impairment. Because EPA found that the installation of scrubbers would reduce visibility impairment and result in visibility improvement, EPA reasonably concluded that the installation of scrubbers "will result in significant visibility improvements." *Id.*

Petitioners also challenge EPA's method of analyzing visibility impacts, arguing that EPA failed to follow the Guidelines by failing to compare $/deciview visibility improvement to a comparison threshold, and that EPA improperly considered the combined visibility improvement attributable to installing scrubbers at three facilities in violation of *American Corn Growers*. Petitioners' Brief 37-39. Petitioners also argue that under *American Corn Growers*, EPA should have analyzed visibility improvement by unit rather than by facility. *Id.* at 38.

With respect to the first argument, the Guidelines do not require a comparison of "$/deciview" to evaluate visibility improvements. *See generally* 70 Fed. Reg. at 39,170. Although the Guidelines list the $/deciview metric as an optional measure that can be employed along with the required $/ton metric to evaluate cost effectiveness, *see id.* at 39,170, EPA explained in the Final Rule and Response to Comments that the $/deciview is not an appropriate metric for use as a determining factor for BART because of the complexity of the technical issues surrounding regional haze. RTC, JA1340; 76 Fed. Reg. at 81,747. EPA explained that in order to use the $/deciview metric as a determining factor as Oklahoma did,

EPA would need to develop thresholds of acceptable costs per deciview, and EPA has not done so. JA1340.[13] However, as required by the Guidelines, EPA did in fact weigh the costs of installing the scrubbers in light of predicted visibility improvements. 76 Fed. Reg. at 81,736, 81,739.

Petitioners' second argument is not accurate. EPA did not base its FIP on aggregate visibility improvements due to the installation of scrubbers at all of the facilities at issue. Instead, EPA analyzed deciview improvements due to the installation of scrubbers at each facility separately as required by the Guidelines and consistent with *American Corn Growers*. *See* TSD, JA1495-98 (Tables listing deciview improvement at each facility); Proposed Rule, 76 Fed. Reg. at 16,185-86 (Tables 8 and 9 indicating the visibility impacts and improvements for each facility at each Class I area); Final Rule, 76 Fed. Reg. at 81,739 (discussing modeling for each facility and including a table indicating the average number of days per year that each facility's visibility impacts exceed 1.0 and 0.5 deciviews before and after the installation of scrubbers).

[13] Petitioners suggest EPA should use thresholds developed by the federal land managers in the context of their comments on States' regional haze SIPs. Petitioners' Brief 37. Although federal land managers perform an important role as caretakers of Class I areas, they are not regulators and have not developed thresholds through notice-and-comment rulemaking. Nor have they requested EPA input on such thresholds. Accordingly, their thresholds are not appropriate for use in drawing a bright line to evaluate cost effectiveness.

Petitioners' third argument is also without merit. Petitioners did not comment on EPA's analysis by facility rather than by unit in the Proposed Rule, *see* 76 Fed. Reg. at 16,185-86 (Tables 8 and 9). Indeed, in OG&E's comments on the Proposed Rule, OG&E insisted that "visibility improvement must be assessed on a facility-by-facility basis." JA1108. Because Petitioners did not raise the argument during the public comment period, Petitioners are barred from raising it here. 42 U.S.C. § 7607(d)(7)(B) (first sentence); *see also Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1042 n.9 (10th Cir. 2006).

In summary, EPA analyzed visibility improvement consistent with the Guidelines. Accordingly, EPA's visibility analysis was reasonable.

III. PETITIONERS HAD ADEQUATE OPPORTUNITY TO COMMENT ON KEY ELEMENTS OF THE FINAL RULE.

As an initial matter, the Court has no jurisdiction to review Petitioners' APA argument while Petitioners' petitions for reconsideration are pending before the Agency. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1065 (D.C. Cir. 2001) (holding that under 42 U.S.C. § 7607(d)(7)(B), petitioners must first raise objections to the Agency either during the notice-and-comment period or through a petition for reconsideration). In any event, Petitioners' argument also fails on the merits.

CAA section 7607(d)'s notice-and-comment procedures are satisfied "where the agency gave adequate notice of the procedures it intended to use, the criteria by

which it intended to select data, and the range of alternative sources of data it was considering." *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006). [14] "EPA undoubtedly has the authority to promulgate a final rule that differs in some particulars from its proposed rule," as long as the final rule is a "logical outgrowth" of the proposal. *Small Refiner*, 705 F.3d at 546-47. Here, there was no relevant change to EPA's methodology, criteria, or data sources between the Proposed and Final Rules. EPA determined that OG&E overestimated costs by including costs that are not allowed by the Manual and that controls would result in significant visibility improvement in the Proposed Rule as well as in the Final Rule. *See* 76 Fed. Reg. at 16,186; 76 Fed. Reg. at 81,736, 81,739.

First, as explained *supra*, the Haze Rule requires the use of the Manual. *See* 76 Fed. Reg. at 81,744. EPA used the term "overnight method" in the Final Rule merely as a shorthand way to describe the Manual's methodology—*i.e.* a methodology that allows projects to be compared in a meaningful manner by excluding certain future costs, escalation, and the effect of inflation. RTC, JA1234-36. In her report supporting the Proposed Rule, Dr. Fox thoroughly explained OG&E's inappropriate inclusion of such costs using the "all-in" method instead of the Manual's method. *See* Fox Report, JA1518-21. OG&E commented on EPA's proposed rejection of the 2009 estimates based on their inclusion of "all-

[14] CAA section 7607(d), rather than the APA, applies to the Final Rule, but the notice-and-comment requirement is the same. *See Small Refiner*, 705 F.2d at 547.

in" costs. *See* RTC, JA1236-73. Thus, OG&E and its consultants had no reason to be surprised by EPA's ultimate rejection of their cost estimates, and should have anticipated their rejection based on EPA's explanation in the Proposed Rule and its supporting documents.

Second, EPA did not mention the "number of days approach" in the Proposed Rule because the approach did not form the basis of EPA's visibility improvements analysis. Rather, consistent with the Haze Rule, EPA analyzed visibility improvements based on "deciview improvements" in both the Proposed Rule and the Final Rule. *See* Haze Rule, 70 Fed. Reg. at 39,120 (States should consider a 1.0 deciview change or more from an individual source to "cause" visibility impairment, and a change of 0.5 deciviews to "contribute" to impairment); *see also* Proposed Rule, 76 Fed. Reg. at 16,186 (Table 9 indicating deciview impacts); Final Rule, 76 Fed. Reg. at 81,739 ("[V]isibility improvements anticipated from the installation of dry scrubbers at each facility will result in reducing modeled impacts . . . from each facility at all nearby Class I areas to levels below 0.5 [deciviews], with improvements greater than 1.0 [deciview] at some Class 1 areas."). In direct response to comments claiming controls would result in imperceptible visibility improvements, EPA merely referred in the Final Rule to the number of days per year each Class I area is impacted by each facility's emissions as another way of illustrating the Agency's conclusion that controls

would yield significant visibility improvements. *See* 76 Fed. Reg. at 81,736, 81,738-39. Furthermore, all of EPA's modeling data, including data summarizing the number of days impacted over 0.5 deciviews and 1 deciview, that was used to formulate Table 1 in the Final Rule was available in the record and provided to Petitioners. *See* SA34-40. Accordingly, Petitioners had no reason to be surprised by EPA's use of data available in the record to further illustrate and support the Agency's ultimate conclusion with respect to visibility improvements and had ample opportunity to comment on that ultimate conclusion and the data the Agency used to reach it. Thus, there was no relevant change to EPA's methodology, criteria, or data sources between the Proposed and Final Rules. Accordingly, the Final Rule was promulgated consistent with the notice-and-comment requirements of CAA section 7607(d)—as a logical outgrowth of the Proposed Rule.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

STATEMENT AS TO ORAL ARGUMENT

Pursuant to Tenth Circuit Rule 28.2(c)(4), Respondent states that oral argument is requested because of the important statutory questions and complex technical issues raised in the petitions for review.

DATED: August 14, 2012

Respectfully submitted,

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Pursuant to CM/ECF User Manual Section II(I), I hereby certify that all required privacy redactions have been made, that any hard copies submitted to the clerk's office are exact copies of the ECF submission, and that the ECF submission was scanned for viruses with Microsoft's Forefront Client Security, Version 1.5.1993.0, which is updated daily, and, according to the program, is free of viruses.

Dated: August 14, 2012

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Pursuant to Fed. R. App. P. 32(a)(7)(C), and exclusive of the components of the brief excluded from the word limit pursuant to Fed. R. App. P. 32(a)(7)(B)(iii), I hereby certify that the foregoing brief contains 13,915 words, in 14 point Times New Roman typeface, as counted by the word count feature of Microsoft Word.

Dated: August 14, 2012

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I hereby certify that I electronically filed the foregoing BRIEF OF RESPONDENT with the clerk of the court for the United States Court of Appeals for the Tenth Circuit using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record:

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